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No. 99-53

Supreme Court, U.S.
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# In the Supreme Court of the United States

M. MAUREEN POLSBY, M.D.,

*Petitioner*,

v.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, DR. THOMAS CHASE, ET AL.,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC., THE FEMINIST MAJORITY FOUNDATION, THE FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES,

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**THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE NATIONAL WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, SELF HELP FOR EQUAL RIGHTS, WIDER OPPORTUNITIES FOR WOMEN, WOMEN EMPLOYED, AND THE WOMEN'S LAW PROJECT**
**AS *AMICI CURIAE***
**IN SUPPORT OF PETITIONER**

## QUESTION PRESENTED

*Amici* will address the following question:

Did the court of appeals improperly deny petitioner the right to present evidence to support her claims of post-employment retaliation by defendants after this Court ruled that former employees are covered by Title VII?

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**BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC., THE FEMINIST MAJORITY FOUNDATION, THE FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE NATIONAL WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, SELF HELP FOR EQUAL RIGHTS, WIDER OPPORTUNITIES FOR WOMEN, WOMEN EMPLOYED, AND THE WOMEN'S LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## INTEREST OF THE *AMICI CURIAE*

Each of the *amici curiae* has a strong interest in the proper application and enforcement of Title VII and in assuring the fair and equal treatment of women in the judicial system. In this case, the Fourth Circuit failed to give effect to this Court's correction of its erroneous ruling that Title VII does not afford protection to former employees. *Amici* believe that reversal of the court of appeals' decision is crucial to ensuring that women alleging sex discrimination and plaintiffs in other employment discrimination cases receive a full and fair opportunity to vindicate their rights under Title VII and other civil rights statutes.[1]

1. The National Organization for Women Foundation, Inc. (NOW Foundation), is a 501(c)(3) organization devoted

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[1] The Solicitor General has consented to the filing of this *amici curiae* brief; a letter indicating consent has been filed with the Clerk of the Court. In addition, pursuant to this Court's Rule 37.6, *amici* certify that counsel for a party did not write this brief in whole or in part, and that no person other than *amici* made a monetary contribution to the preparation of the brief.

to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women (NOW), the largest feminist organization in the United States, with more than 500,000 contributing members in more than 500 chapters in all 50 States and the District of Columbia. Since its inception in 1986, NOW Foundation's goals have included equality and fair treatment for women.

2. The Federation of Organizations for Professional Women (FOPW) is a national non-profit federation of affiliated women's organizations and individual associate members, working since its inception in 1972 to enhance the status of professional women. The FOPW is dedicated to professional and scientific integrity. Among FOPW's many goals are strengthening women's networking and communication skills through training and education, providing a forum for the mutual exchange of ideas and support, and keeping its membership abreast of legal developments that impact professional women.

3. The Feminist Majority Foundation (FMF) is a non-profit organization with offices in Arlington, Virginia and Los Angeles, California. FMF is dedicated to eliminating sex discrimination and to promoting equality, women's rights, and safe access to abortion and birth control. For years, FMF has supported Dr. Polsby's efforts to remedy the discrimination and injustices she endured in her position at the National Institutes of Health. FMF houses the Maureen Polsby Legal Defense Fund, which assists in securing funding for costs associated with her case.

4. The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 attorneys who regularly represent employees in labor, employment, and civil rights disputes. NELA regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed many *amicus curiae* briefs before this Court and the federal appellate and

district courts regarding the proper interpretation and application of employment discrimination laws. NELA filed an *amicus* brief in *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997), and NELA members have brought post-employment retaliation cases following *Robinson*. NELA thus has a compelling interest in ensuring that the holding of that case is followed and that Title VII protections for former employees are protected and fully realized.

5. The National Partnership of Women & Families (NPWF) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the NPWF (formerly the Women's Legal Defense Fund) has placed special emphasis on ensuring effective and rigorous enforcement of Title VII by monitoring agencies' EEO enforcement efforts, challenging sex-based discrimination in the courts, and leading efforts to promote federal legislation protecting employees.

6. The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC has a deep and abiding interest in assuring the eradication of discrimination against women in the workplace.

7. NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of NOW as a separate organization. A major goal of NOW LDEF is the elimination

of barriers that deny women economic opportunity. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting employment discrimination.

8. Self Help for Equal Rights (SHER) is a women's advocacy group at the National Institutes of Health (NIH), the major health research organization of the United States government. Organized in 1972, SHER has worked continuously for employee rights and against sex discrimination in the workplace at NIH. At NIH, SHER monitors the EEO process and advocates on behalf of women for internal process improvements. SHER also educates employees at NIH about the EEO complaint process, represents women in EEO grievances and appeals, and disseminates news and advice through weekly meetings, speaker programs, and flyers.

9. Wider Opportunities for Women (WOW) works nationally and in its home community of Washington, D.C., to achieve economic independence and equality of opportunity for women and girls. For more than 30 years, WOW has helped women learn to earn, with programs emphasizing literacy, technical, and nontraditional skills, the welfare-to-work transition, and career development.

10. Women Employed is a national association of working women based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women facing problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that sex discrimination is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace.

11. The Women's Law Project (WLP) is a non-profit public interest legal center located in Philadelphia,

Pennsylvania. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP has a strong interest in the eradication of sex discrimination in the workplace and the availability of strong and effective remedies for women whom seek relief from discrimination.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Maureen Polsby's career as a neurologist was permanently derailed by her former employer's acts in retaliation for her exercise of rights under Title VII. Dr. Polsby fought long and hard to have her retaliation claims fully and fairly adjudicated but was prevented from doing so — first by the Fourth Circuit's erroneous decision that post-employment claims were not covered by Title VII, and later by its failure to give effect to this Court's reversal of that decision. The court of appeals' reluctance to apply current law to a case on appeal, its willingness to make *de novo* factual findings on the basis of an incomplete evidentiary record, and its improper application of harmless error doctrine demand an exercise of this Court's supervisory powers.

Dr. Polsby's case first came before this Court several years ago after the court of appeals summarily affirmed the dismissal of her sexual harassment claims as untimely and used her case as an opportunity to rule, *sua sponte*, that post-employment retaliation claims were not cognizable under Title VII. After this Court granted her petition for certiorari, vacated the Fourth Circuit's judgment, and remanded the case, Dr. Polsby pursued her post-employment claims in the district until the Fourth Circuit ruled once again, in *Robinson* v. *Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), that Title VII does not protect former employees from retaliation. Bound by that then-controlling precedent, the district court did not allow Dr. Polsby's post-employment claims to proceed to trial. While

Dr. Polsby's case was on appeal, this Court reversed the Fourth Circuit and ruled that post-employment retaliation claims are cognizable under Title VII. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997).

Although Dr. Polsby was plainly entitled to benefit from this change of the law in her favor, the court of appeals refused to revive her post-employment retaliation claims. Instead of following the normal procedure of reversing and remanding for further proceedings consistent with *Robinson*, the court of appeals ruled instead that "any error" in ruling out Dr. Polsby's post-employment claims was harmless because "the evidence failed to support her claims of post-employment retaliation."

The Fourth Circuit's decision that the dismissal of Dr. Polsby's post-employment claims was "harmless" was blatant error. According to the court of appeals, it reviewed the record and determined that Dr. Polsby had presented insufficient evidence to support her post-employment claims. ***But those were the very claims that the Fourth Circuit's overly narrow interpretation of Title VII had foreclosed.*** Dr. Polsby never had the opportunity to litigate those claims in the district court, and the court of appeals' decision that she should lose that right again because the record evidence of retaliation was insufficient was utterly irrational.

The court of appeals' highly prejudicial error emerged from its disregard of multiple principles of appellate procedure. First, appellate courts are required to apply intervening changes in the law to cases on appeal. Second, appellate courts normally should not act as initial factfinders, and ***may not*** properly do so when an error below has rendered the record incomplete. Third, and relatedly, appellate courts may not deem "harmless" errors that entirely prevented the plaintiff from presenting in the district court evidence relating to a legally sustainable claim.

Dr. Polsby's is not the only case in which the Fourth Circuit has effectively denied litigants the benefit of this Court's decision in *Robinson* v. *Shell Oil*. In fact, the court of appeals has expressed doubt whether the interpretation of Title VII announced in *Robinson* applies "retroactively" to events that occurred before the *Robinson* decision.

The Fourth Circuit's apparent reluctance to apply a decision of this Court affording more expansive protection to victims of unlawful retaliation and its eagerness to affirm a district court decision that denied the plaintiff ***any*** opportunity to present her retaliation claims at trial threatens plaintiffs in all civil rights cases. Victims of discrimination rely on the courts of appeals to correct trial errors that deny them the ability to vindicate their rights. This Court should grant the petition for certiorari and reverse the Fourth Circuit's decision.

## STATEMENT OF THE CASE

The procedural history of this case has been described as "somewhat tortured," *Polsby* v. *Shalala*, 925 F. Supp. 379, 381 (D. Md. 1996). The following facts are relevant to the issue raised in this *amicus* brief.

Dr. Maureen Polsby alleged that she was the victim of gender-based discrimination during her two-year tenure as a medical staff fellow at the National Institutes of Health (NIH) from 1983 to 1985, in violation of Title VII of the Civil Rights Act of 1964. She claimed, among other things, that during her fellowship (after she rejected one supervisor's sexual advances at a medical conference) her supervisors treated her differently than her male peers by assigning her to menial tasks; failing to support her research projects; misappropriating her independent research; and denying her the renewal of her fellowship for a third year.

Dr. Polsby also alleged that the defendants retaliated against her for pursuing a discrimination complaint. Among other acts of retaliation, Dr. Polsby claimed that, shortly after

she initiated EEOC proceedings, one of her supervisors represented in a letter to the American Board of Psychiatry and Neurology that Dr. Polsby's completion of the two-year fellowship did not entitle her to any credit toward the residency requirements necessary for board certification. Dr. Polsby alleged that, as a result of this and other retaliatory conduct by the defendants, her medical career was irrevocably derailed.

In 1988, after exhausting her administrative remedies, Dr. Polsby sued the defendants in the United States District Court for the District of Maryland. In 1991, the government moved for summary judgment on the grounds (1) that all of Dr. Polsby's claims were untimely; and (2) that she could not make out a *prima facie* case for her retaliation claims. The district court granted summary judgment against Dr. Polsby, ruling that her claims were time-barred because she had failed to contact an EEO counselor within thirty days of the challenged behavior and that no equitable principles excused the untimely filing. *Polsby* v. *Sullivan,* No. HAR 88-2344, 1991 U.S. Dist. LEXIS 17347, 57 Fair Empl. Prac. Cas. (BNA) 753 (D. Md. 1991) ("*Polsby I*"). The court did not reach the issue of whether Dr. Polsby had established a *prima facie* case of retaliation.

Dr. Polsby appealed to the Fourth Circuit, which affirmed the district court's ruling that the claims were time-barred. The Fourth Circuit also ruled, *sua sponte*, that Dr. Polsby's claims of post-employment retaliation were not actionable because Title VII does not protect former employees. *Polsby* v. *Chase*, 970 F.2d 1360 (4th Cir. 1992) ("*Polsby II*"). *Polsby II* was the first decision in which the Fourth Circuit advanced this narrow reading of Title VII — and was issued at a time when almost every other circuit to have assessed the breadth of Title VII had reached a contrary determination.

Dr. Polsby filed a petition for certiorari. Representing the defendants, the Acting Solicitor General confessed error and

agreed with Dr. Polsby that the district court erred in ruling that her claims were time-barred. The government also agreed with Dr. Polsby that post-employment claims were actionable under Title VII, but argued that the case was "an inappropriate vehicle for resolving that question":

> The parties did not brief or argue the question in the court of appeals. * * * Moreover, because the government disagrees with the court of appeals' view that the retaliation provisions of Title VII are entirely inapplicable to former employees, neither party in this case supports the conclusion of the court of appeals on that point. * * * In sum, because the decision of the court of appeals constitutes an alternative ground for decision unnecessary to the result and does not rest on an adversary presentation of the question, there is no reason for this Court to consider the question at this time.

Gov't Br., No. 92-966, 8-9. The government recommended that this Court grant Dr. Polsby's petition, vacate the judgment, and remand to the Fourth Circuit for reconsideration of the timeliness issue alone.

This Court followed that recommendation, vacating and remanding the decision to the Fourth Circuit "in light of the position presently asserted by the Acting Solicitor General in his brief for the United States filed March 5, 1993." *Polsby* v. *Shalala*, 507 U.S. 1048 (1993) (*"Polsby III"*). The court of appeals, in turn, remanded the action back to the district court.

After the remand, Dr. Polsby filed two additional complaints, alleging that further acts of retaliation had occurred since the filing of her first complaint. The district court consolidated the complaints and denied the government's motion to dismiss with respect to all but one of Dr. Polsby's claims of post-employment retaliation. See *Polsby* v. *Shalala*, No. DKC 88-2344, slip op. at 15-16 (D. Md. April 20, 1995)

("*Polsby IV*").[2] The surviving post-employment claims concerned the defendants' denial of residency credit for Dr. Polsby's fellowship, their attempts to interfere with her later efforts to earn residency credit, and the misappropriation of her research. The district court expressly ruled (*id.* at 16) that two of these claims fell under the purview of the Civil Rights Act of 1991, which provides for the trial by jury of certain violations of Title VII.

While Dr. Polsby's case was proceeding in the district court, a panel of the Fourth Circuit ruled that post-employment retaliation claims are cognizable under Title VII. *Robinson* v. *Shell Oil Co.*, No. 93-1562, 1995 U.S. App. LEXIS 939 (4th Cir. Jan. 18, 1995). The Fourth Circuit sitting *en banc* granted rehearing and reversed course, ruling that Title VII does not afford protection to former employees. *Robinson* v. *Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995).[3]

Relying on *Robinson*, before trial the district court dismissed Dr. Polsby's post-employment claims from her consolidated actions, limiting her case to those acts of discrimination and retaliation that occurred ***during*** her fellowship and denying her the right to try any of her claims

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[2] The district court dismissed one of Dr. Polsby's retaliation claims as "too speculative." *Id.* at 13.

[3] *Robinson* reached the Fourth Circuit after Shell successfully relied on *Polsby II* to support a motion to dismiss Robinson's post-employment retaliation claims. By the time Robinson appealed to the Fourth Circuit, this Court had vacated *Polsby II* without addressing whether post-employment retaliation claims were actionable under Title VII. Accordingly, the court of appeals found that it could "write on a clean slate." *Robinson*, 70 F.3d at 328.

to a jury.[4] Joint Pre-Trial Order 24 (limiting action to Dr. Polsby's "two year medical staff fellowship and her claim of gender discrimination in * * * denial of an extension of her fellowship"); Transcript of Pretrial Conference 5 (court "would have tried the post-employment retaliation claims to a jury"). The district court expressly noted that it might "have to redo something" (*ibid.*) if this Court were to reverse the Fourth Circuit's *en banc* decision in *Robinson*.

Thus, Dr. Polsby was not permitted to complete discovery or present evidence at trial concerning any of her claims of post-employment retaliation. After a thirteen-day bench trial, the district court ruled for defendants on the remainder of Dr. Polsby's claims. *Polsby* v. *Shalala*, 925 F. Supp. 379 (D. Md. 1996) ("*Polsby V*"). Dr. Polsby again appealed to the Fourth Circuit, challenging among other things the district court's pre-trial dismissal of her post-employment claims.

While Dr. Polsby's appeal was pending, this Court unanimously reversed the Fourth Circuit's decision in *Robinson*, and ruled that Title VII affords protection to former employees. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997). Despite this Court's reversal of *Robinson*, the Fourth Circuit summarily affirmed the dismissal of Dr. Polsby's post-employment claims. Although the court of appeals acknowledged that the district court had dismissed those claims on the basis of its now-discredited decision in *Robinson*, it stated that "any error in applying the former standard was harmless as our review of the record reveals that the evidence failed to support her claims of post-employment

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[4] While noting that she "applauded the circuits that have reached the conclusion that Title 7 ought to reach post-employment retaliation," the district judge concluded that she was bound by the *Robinson* decision to dismiss Dr. Polsby's post-employment claims. Transcript of Pretrial Conference 17.

retaliation." Pet. App. 2a, *Polsby* v. *Chase*, No. 96-1793 (4th Cir. Oct. 21, 1998) ("*Polsby VI*").

## ARGUMENT

### I. DR. POLSBY WAS ENTITLED TO THE BENEFIT OF THIS COURT'S RULING IN *ROBINSON* V. *SHELL OIL CO.* THAT FORMER EMPLOYEES ARE PROTECTED BY TITLE VII

Almost two hundred years ago, this Court stated:

> [I]f subsequent to the judgment [in the trial court] and before the decision of the appellate court, a law intervenes and positively changes the rule which governs * * * the court must decide according to existing laws, and if it be necessary to set aside a judgment * * * which cannot be affirmed but in violation of law, the judgment must be set aside.

*United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). More recently, this Court has strongly reaffirmed that, when it "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper* v. *Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993); see also *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 752 (1995); *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 534-535 (1991). As a matter of appellate procedure, when a significant change in the law affects a case on appeal, the court of appeals normally remands the case so that the district court can apply the new rule to the facts and, if necessary, allow further development of the evidentiary record. See, *e.g.*, *Scott* v. *Norfolk Southern Corp.*, No. 97-1490, 1998 U.S. App. LEXIS 13470 (4th Cir. 1998) (vacating and remanding district court decision dismissing appellee's same-gender sexual harassment and hostile work environment

claim because of intervening change in the law permitting such claims); *Reinhold* v. *Virginia*, 151 F.3d 172 (4th Cir. 1998) (remanding for record development a case that was affected by two Supreme Court decisions); *Tarpley* v. *Jeffers*, 96 F.3d 921, 924 (7th Cir. 1996) (remanding case for determination by the district court whether plaintiff had standing in light of Supreme Court decision overruling earlier circuit case law); *Robinson* v. *Freeze*, 15 F.3d 107, 109 (8th Cir. 1994) (reversing and remanding district court grant of summary judgment following intervening change in the law because "the summary judgment record and decision in this case were developed without the benefit of the Supreme Court's decision" and the issue "should be considered in the first instance by the district court on a proper record").

When this Court announced in *Robinson* that Title VII provided protection for former employees, the federal courts were obligated to apply that rule to all pending cases, including cases on appeal. The Seventh Circuit — which like the Fourth Circuit had ruled that former employees were not protected by Title VII (*Reed* v. *Shepard*, 939 F.2d 484 (7th Cir. 1991)) — followed this rule in *Betts* v. *Container Corp. of America*, No. 95-1064, 1997 U.S. App. LEXIS 10648 (7th Cir. 1997). The district court had dismissed Betts's post-employment retaliation claim, concluding that it "was a loser because Title VII affords no remedy for post-termination retaliation against former employees." *Betts*, 1997 U.S. App. LEXIS 10648, at *2. While Betts's case was on appeal, however, this Court rendered its decision in *Robinson* v. *Shell Oil Co.*

On appeal, the Seventh Circuit observed that, by a fortuity of timing,[5] Betts "gets the benefit of a recent Supreme Court

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[5] The Seventh Circuit noted that Betts's claims, which had arisen almost a dozen years earlier, would have been closed long ago had the case moved more swiftly and not "dragged on so long." *Betts*, 1997 U.S. App. LEXIS 10648, at *1.

decision which breathes new life into one of her claims." *Betts*, 1997 U.S. App. LEXIS 10648, at *1-2. The court reversed and remanded her post-employment retaliation claims, stating:

> "Robinson means that Betts' retaliation claim has risen from the dead and ***must be remanded to the district court for further proceedings.***"

*Id.*, at *3 (emphasis added); see also *Betts* v. *Container Corp. of America*, Nos. 98-2513 and 98-4076, 1999 U.S. App. LEXIS 3229 (7th Cir. 1999) (noting that Betts's retaliation charge had a "spark of life" after this Court's decision in *Robinson*).

Here, as in *Betts*, the district court dismissed Dr. Polsby's claims of post-employment retaliation before trial and before completion of discovery, stating that it was bound to do so by the Fourth Circuit's *en banc* decision in *Robinson* v. *Shell Oil*, 70 F.3d 325. Joint Pre-Trial Order 24. While Dr. Polsby's case was on appeal, the Supreme Court reversed *Robinson*. It could not have been clearer that Dr. Polsby was entitled to have her post-employment retaliation claims resurrected and remanded to the district court for further proceedings.

The court of appeals, however, refused to allow the *Robinson* decision to "breathe new life" into Dr. Polsby's post-employment retaliation claims. In fact, the Fourth Circuit has ***never*** found a remand to be justified in any case pending on appeal when its decision in *Robinson* was reversed, and instead ***repeatedly*** has declined to reverse and remand cases in which the district court had dismissed or granted summary judgment on an employee's post-employment claims based on the *en banc Robinson* decision. See *Polsby VI*; *Harris* v. *Prince George's County Public Schools*, No. 96-2785, 1998 U.S. App. LEXIS 7703 (4th Cir. 1998); *Karpel* v. *Inova Health Sys. Servs.*, 134 F.3d 1222 (4th Cir. 1998); *Jensvold* v. *Shalala*, No. 96-1964, 1998 U.S. App. LEXIS 6514 (4th Cir. 1998).

In two of these cases, the Fourth Circuit purported to affirm an alternative ground for decision proffered by the district court. See *Harris*, 1998 U.S. App. LEXIS 7703, at *7 (ruling that, "aside from the Robinson ruling, Harris' proffered proof failed to support his claim of discriminatory retaliation"); *Jensvold*, 1998 U.S. App. LEXIS 6514, at *3 (ruling that trial court's error in relying on *Robinson* to dismiss post-employment retaliation claims following trial "was rendered harmless by the court's determination of Jensvold's post-employment Title VII claims on the merits"). In two other cases (including this one), however, the Fourth Circuit found the reliance on *Robinson* to be harmless based on alternative grounds never considered by the court below. See *Polsby VI*; *Karpel*, 134 F.3d at 1230 (affirming grant of summary judgment for employer on employee's post-employment retaliation claims notwithstanding the intervening *Robinson* decision on ground that employee failed to establish a *prima facie* case of retaliation).

Indeed, the Fourth Circuit has questioned whether this Court's *Robinson* decision applies "retroactively" to cases pending on appeal at the time the decision was rendered, stating in one case:

> We need not decide whether the Supreme Court's *Robinson* decision applies retroactively to Inova's actions against Karpel after she had been terminated because, even assuming arguendo that the decision is retroactive, Inova's action * * *does not constitute "adverse action."

*Karpel*, 134 F.3d at 1230.

The Fourth Circuit's disinclination to give "retroactive" effect to the *Robinson* decision — in the face of this Court's unequivocal insistance that judicial decisions (unlike some legislation) be applied to cases pending on direct appeal— has plainly caused it to reach too far to find "harmless" the prior application of its discredited rule excluding post-employment retaliation claims from Title VII's coverage. As discussed

further below, there was simply no basis for the court of appeals' finding of harmless error in Dr. Polsby's case. In effect, the Fourth Circuit simply denied Dr. Polsby the benefit of an intervening change in the law, to her great prejudice.

## II. THE FOURTH CIRCUIT HAD NO BASIS FOR DECLARING THE DISMISSAL OF DR. POLSBY'S POST-EMPLOYMENT CLAIMS "HARMLESS"

It is well-established that an error is "harmless only if it caused no prejudice to a substantial right of the party complaining of the error." 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §206.07[2] (3d ed. 1997); see also 28 U.S.C. § 2111 (1999) (an error is harmless if it does not affect "the substantial rights of the parties"). The harmless error rules permit the courts to "exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984). A trial court's erroneous dismissal of an entire claim necessarily affects the "substantial rights" of the plaintiff, unless it is clear that the plaintiff for other reasons could not have prevailed on that claim. Where, as here, the error totally prevented the presentation of evidence on an otherwise sustainable claim, it is difficult to imagine circumstances under which an appellate court could properly find the error harmless. *Cf. Rose* v. *Clark*, 478 U.S. 570, 580 n.7 (1986) (in finding error harmless, noting that it "did not affect the composition of the record").

It is widely recognized, moreover, that an appellate court should resolve a question that was not addressed by the court below only in limited circumstances. Such a ruling may be appropriate if "[t]he factual record is developed and the issues provide purely legal questions, upon which an appellate court exercises plenary review." *Hudson United Bank* v. *LiTenda Mortgage Corp.*, 142 F.3d 151, 159 (3d Cir. 1998) (citations omitted). "When the resolution of the issue requires the

exercise of discretion or fact finding," however, "it is inappropriate and unwise for an appellate court to step in." *Ibid.* See also *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986) ("If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. * * * But it should not simply have made factual findings on its own."); *Murray* v. *United States*, 487 U.S. 533, 543 (1988) ("[i]t is the function of the District Court rather than the Court of Appeals to determine the facts").

The Fourth Circuit's wrongheaded affirmance of the district court's erroneous dismissal of Dr. Polsby's retaliation claims cast aside these well-established principles. The court of appeals not only made factual findings concerning the merits of those claims without affording the district court the opportunity to rule upon them in the first instance; it made its ruling based upon an incomplete — indeed, in pertinent respects, nonexistent — record.

Dr. Polsby's claims were dismissed before trial because the trial court understood them to be barred categorically by the Fourth Circuit's *en banc* decision in *Robinson*. See Transcript of Pretrial Conference 22-23 (limiting issues to be tried to Title VII claims arising before July 1985). Dr. Polsby thus did not complete discovery concerning her claims of post-employment retaliation; she was allowed to present no evidence at all concerning those claims during her thirteen-day trial; and the district court did not address those claims in its sixteen-page published opinion addressing the merits of Dr. Polsby's remaining claims. In short, Dr. Polsby had no opportunity to litigate her post-employment claims fully and fairly — indeed, no opportunity to litigate their merits at all — in the trial court.

Because Dr. Polsby did not have the opportunity to present evidence relating to her post-employment claims at

trial, it is not surprising that the Fourth Circuit found the evidence in the record insufficient to support those claims. By affirming on appeal despite the *Robinson* error, the Fourth Circuit created a bizarre "Catch 22" in which Dr. Polsby was erroneously denied the opportunity to prove her claims and then denied any remedy for that error ***because*** she had failed to prove her claims.

The Fourth Circuit's decision plainly was contrary to established principles of appellate review. After this Court ruled that post-employment retaliation claims such as Dr. Polsby's were cognizable under Title VII, she was entitled to litigate those claims fully before the factfinder of first instance. To ensure that Dr. Polsby had the opportunity to do so, the Fourth Circuit had only to remand the case to the district court for further proceedings consistent with *Robinson*. This Court should do grant review and order the Fourth Circuit to do so now.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

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